IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Trade Tax Revision No. 72 of 2005

Executive Engineer, Project Division,
U.P. Jal Nigam, Haldwani .....Revisionist

Versus

Commissioner of Trade Tax,
Dehradun, Uttaranchal ... Respondent

AND

Trade Tax Revision No. 73 of 2005

Executive Engineer, Project Division,
U.P. Jal Nigam, Haldwani ...Revisionist

Versus

Commissioner of Trade Tax,
Dehradun, Uttaranchal ....Respondent

AND

Trade Tax Revision No. 74 of 2005

Executive Engineer, Project Division,
U.P. Jal Nigam, Haldwani ...Revisionist

Versus

Commissioner of Trade Tax,
Dehradun, Uttaranchal ...Respondent

AND

Trade Tax Revision No. 75 of 2005

Executive Engineer, Project Division,
U.P. Jal Nigam, Haldwani ....Revisionist

Versus

Commissioner of Trade Tax,
Dehradun, Uttaranchal ...Respondent

Sri D.S. Patni, learned counsel for the revisionist
Sri Pitamber Maulekhi, Additional Advocate General for the respondent

Hon'ble B.S. Verma, J.

1. Since there is a common question of law involved in all the revisions, therefore, all the aforesaid revisions have been heard

together and are being disposed of by this single judgment and order.

2. These revisions, preferred u/s 11 (1) of the U.P. Sales Tax Act, 1948, are directed against the judgment and order dated 13.07.2005, passed by the Trade Tax Tribunal, Dehradun, Branch — Haldwani is Second Appeal Nos.52/1998 (1990-91-penalty), 53/1998 (1991-92), 54/1998 (1992-93) and 55/1998 (1991-92), annexure-3 of the revision).

3. Brief facts of revisions are that the revisionist-Jal Nigam renders all necessary services regarding water supply and also operate, run and maintain works relating to water supply and sewerage system etc. The revisionist-Jal Nigam also carries out the schemes for water supply and sewerage and enters into the contract, agreement with the contractors for performing the functions which are required to be done under the Act. For the above work, the revisionist had to import goods from outside the State and also to purchase tax paid goods locally on form 3D. It was not disputed that for the assessment years, tenders were invited to perform the work as has been given to the contractor. For the said work, cement was supplied by the U.P. Jal Nigam to their contractors and the prices of the cement had been deducted from the bills. It was contented on behalf of the revisionist that the cement was not sold and cement was under the ownership and control of the revisionist and it was used to carry out the work of the department, hence it is not a sale under Section 2 (h) of the Act. .

4. The learned Trade Tax Officer passed assessment order under Section 7 (3) of the U.P. Trade Tax Act on 16.03.1996 imposing tax on the revisionist for the supply of cement to the

contractor on the ground that the cement which was purchased against form-D only can be utilized in their work but the assessee-revisionist supplied the cement to the contractor and deducted the price of cement from the bills, hence it is a sale and also imposed penalty u/s 10-A of Central Sales Tax Act amounting to Rs. 3,790/- on the ground that for the year 1991-92, they used form-C for purchase of cement out of the State for which the Nigam was not authorized to do so. Feeling aggrieved by this order, the revisionists preferred the appeal before the Deputy Commissioner (Appeals), Trade Tax Uttarakhannd, Haldwani which was dismissed by a common order dated 22.02.1997 by the Deputy Commissioner (Appeals), Haldwani. Feeling aggrieved by the order dated 22.09.1997, the revisionist preferred the second appeal and the said appeal was also dismissed by a common judgment vide order dated 13.07.2005 for the assessment years 1990-91, 1991-92, 1992-93 and 1991-92.

5. Feeling aggrieved by the order of the Tribunal, the present revision has been preferred before this Court.

6. The following substantial questions of law are involved in the these revisions :-

i. Whether the supply of cement material to the contractor for execution of work entrusted by the revisionist for carrying out its own activities constitute a sale, especially when such materials cannot be sold out by the contractor to any third party and the surplus material has to be return back by such contractor to the revisionist.

ii. *Whether the supply of cement material brought from outside the State and consumed in the State in pursuance*

of the execution work contract and the value thereof cannot be subjected to the trade tax penalty.

7. It was contended on behalf of the revisionist that the learned Tribunal misinterpreted the judgment of the Hon'ble Apex Court while passing the impugned order. It was contended that the order passed by the learned Tribunal is not sustainable in the eye of law.

8. Now, I have to determine whether the said transactions between the revisionist and the contractor come within the meaning of the word 'sale' under the provisions of 2(h) of the Act or not. Section 2 (h) is provided as under :-

> ***(h) 'Sale'*** *with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) for case or deferred payment or other valuable consideration and includes —*
>
> *(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;*
>
> *(ii) a transfer of property in goods (whether as goods or in some other forms) involved in the execution of a works contacts;*
>
> *(iii) the delivery of goods on hire purchase or any systems of payment by instalments;*
>
> *(iV) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;*

(v) the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; and

(vi) the supply, by way of or as part of any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration;

9. The learned Tribunal while holding that the said transaction comes within the meaning of 'sale' has referred the judgment of the Hon'ble Supreme Court in **1989(1) SCC p/335, M/s N.M. Goel and Co., Vs. Sales Tax Officer, Rajnandgaon and** another, in which N.M. Goel-Company was a building contractor in Madhya Pradesh and is registered as a dealer under the M.P. General Sales Tax Act. The company's tender for construction of foodgrains godwon and ancillary buildings was accepted by the Central Public Works Department (C.P.W.D.). It was an item of rate tender. In the tender, the prices of the materials to be used for the construction including the cost of iron, steel and cement was included. The CPWD had agreed to supply from its stores the said iron, steel and cement for the construction work and to deduct the prices of materials so supplied and consumed in the construction from the final bill of the company. In pursuance of the contract, the company was assessed by the department for entry tax for the relevant periods, including penalty. The company filed revisions before the Deputy Commissioner of Sales Tax who affirmed the assessment orders. When the matter came up before the High Court, there was a question whether there was a sale and whether the property in the goods in question

passed to the company or continued to remain with the PWD although the PWD had in the final bill debited the prices of the goods so supplied to the company under clause 10 of the contract. The High Court found that there was sale and as a result of that the duty was leviable. When the matter came up before the Hon'ble Supreme Court, it was held that in order to be sale taxable to duty, not only the property in the goods should pass from the contractor to the government, or the company but there should be an independent contract – separate and distinct – apart from mere passing of the property where a party purchases or procures goods from the government. Mere passing of property from the contractor to the government would not suffice. There must be a sale of goods. The primary object of the bargain judged in its entirety must be viewed. It was further held that the purpose of performance, the contractor was bound to procure materials. But in order to ensure that quality materials are procured, the PWD undertook to supply such materials and stores as from time to time required by the contractor to be used for the purpose of performing the contract only. The value of such quantity of materials and stores so supplied was specified at the rate and got set off or deducted from any sum due or to become due thereafter to the contractor. It was further held by the Hon'ble Supreme Court that the said transaction of providing cement by the PWD to the company was a sale.

10. The similar controversy came again for consideration before the Apex Court in **Rahtriya Ispat Nigam Ltd. Vs. State of A.P. (1998) 8 SCC page 439** in which the Hon'ble Apex Court held that for the purpose of performance, the contractor was bound to procure materials. But in order to ensure that quality materials are procured, the PWD undertook to supply such

materials and stores as from time to time required by the contractor to be used for the purpose of performing the contract only. The value of such quantity of materials and stores so supplied was specified at a rate and got set off or deducted from any sum due or to become due thereafter to the contractor. The attempt of the assessee to define this case with the case of the Goel's case (Supra), on facts, came to be rejected by the Apex Court, In that case also the Apex Court held that the use or consumption of the supply materials there was passing of property and by virtue of sheet of value of such transferred property by way of adjustment in bills the consideration has also passed over and in the opinion of the Apex court, there was a sale which was liable to tax under the Sales Tax Act.

11. A similar question was also involved in **Karyapalak Engineer, C.P.W.D., Bikaner Vs. Rajasthan Taxation Board, Ajmer & others reported in 2005 (Vol.37) Sales Tax Journal p/1.** In the said case, the CPWD undertook the work of erection of barbed wire fencing along Indo-Pak boarder. In order to get the construction work, the appellant awarded contracts to various contractors and under the terms of the contract it had been agreed to supply the contractors materials such as cement, bared wire, etc. The appellant purchased the materials and supplied to the contractors and the value of the goods were adjusted in the final bills of the contractors. The Hon'ble Supreme Court has held that by the use or consumption of materials supplied in the work of construction there was passing of property and by virtue of receipt of value of such transferred property by way of adjustment in bills the consideration has also passed which satisfies the definition of 'sale' in the local Sales Tax Act.

12. It is pertinent to mention here that by perusal of the impugned judgment of Tribunal, it reveals that the counsel for the revisionist after perusing the said judgment of the Apex Court has conceded the fact that such type of supply of cement will be sale and tax can be imposed but at the same he raised the objection on this effect that the proceeding of Sect 3G (3) of the Trade Tax Act cannot be initiated alongwith assessment order and to support his contention he relied upon the judgment of Hon'ble Allahabad High Court in **Bharat Pumps and Compressors Ltd.** The learned Tribunal had rightly held that the facts of the present case are different. It was not held in the said judgment that no direction can be issued along with assessment order. It was held in the said judgment that the order u/s 3G is not an assessment order wherein this fact came in the knowledge of the Assessing Officer that the cement was purchased in reference to form 3-D and it was sold out to contractor. Then the Assessing Officer passed order u/s 3G (3) of the Act and no objection was raised before first appellate court since the order was passed after hearing of the revisionist. Hence no prejudice was caused to him and furthermore no ground has been raised in the memo of revision to press said point.

13. Lastly, learned counsel for the revisionist relied upon the judgment of this Court in **STR No. 47/03 CST Vs. Executive Engineer, PWD** wherein it has been held that no tax can be imposed in such kind of transactions, more so between two wings of the government. The learned counsel also relied upon the judgment of the Hon'ble Allahabad High Court in **Indian Farmers Fertilizers corporation Ltd. Vs. CST reported in 1995 UPTC p/579** in which the judgment of M/s N.M. Goel (Supra) has also been considered. After the judgment of

Allahabad High Court in **Indian Farmers Fertilizers corporation Ltd (Supra)** a similar controversy has again came for consideration before the Apex Court in **Rastriya Ispat Nigam Ltd. Vs. State of A.P. (1998) 8 SCC p/439** and **Karyapalak Engineer, C.P.W.D., Bikaner Vs. Rajasthan Taxation Board, Ajmer & others reported in 2005 (Vol.37) Sales Tax Journal p/1** as has been discussed in foregoing paragraphs wherein it was held that such type of supply to the contractor by the department is a sale. In the judgment rendered by the Single Judge of this court in **S.T.R. No. 47 of 2003 C.S.T. Vs. Executive Engineer, P.W.D.,** the judgments rendered by the Hon'ble Apex Court in Rastriya Ispat Nigam Ltd. (Supra) and Karyapalak Engineer, C.P.W.D., Bikaner (Supra) were not considered. Hence, the revisionist could not take benefit of the said judgments of this court.

14. In T.T.R. No. 72 of 2005 which was filed against the judgment and order of the second appeal No. 55 (1991-92-penatly). The revisionist could not show me any provision that the Nigam was entitled to purchase the cement against Form-C in the year 1991-92. The cement was purchased from out of the State against form-C for which the Nigam was not entitled. Hence, the penalty has rightly been imposed on the revisionist-Nigam.

15. In view of the foregoing discussion, the present revisions are squarely conversed by the aforesaid judgments of the Hon'ble Apex Court. Therefore, the transactions between the revisionist and the contractor come within the meaning of the word 'sale' under the provisions of 2(h) of the Act. I do not find any ground for the inference in these matters. The revisions are devoid of merit and therefore the revisions are dismissed accordingly.

16. This revision is squarely covered by the judgment passed by this court in Sales Tax Revision No. 55 of 2006 dated 25.05.2006, Sri Akhil Bharati Maheswari Seva Sadan Vs. The Commissioner Trade Tax, Uttaranchal. The said question was answered in favour of the department.

17. All applications pending in this case are stand disposed of in terms of the judgment.

7th June, 2006 **(B.S. VERMA J.)**

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